86-689

Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1986

AMERICAN SAVINGS AND LOAN ASSOCIATION,
Petitioner,

VS.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
AS RECEIVER FOR SAN MARINO SAVINGS AND LOAN ASSOCIATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the courts of California have exclusive jurisdiction to consider state law claims against a state-chartered savings and loan association, despite the appointment of the Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver for the association.

2. Whether state courts or FSLIC have the power to adjudicate all pre-receivership claims against failed institutions.

3. Whether the exclusive jurisdiction of a California court to deal with certain property, acquired when the property came into the possession, custody and control of the California court by attachment, may later be disturbed by a federal court or agency claiming jurisdiction over the same property.

4. Whether an administrative remedy created by federal regulation and not by statute must be exhausted when the exhaustion requirement will cause irreparable injury by the loss of $14,000,000 in attachment liens.

5. Whether, upon the appointment of FSLIC as receiver of a state-chartered savings and loan association, a pre-existing state court action in which attachment liens were obtained should be dismissed, despite the absence of congressional authority for the destruction of those liens, or whether the action should be abated pending the determination of the underlying claims, with the attachment liens being preserved pending the outcome.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

OPINION OF THE COURT BELOW

On April 25, 1986, the California Court of Appeal, Third Appellate District, issued its reported decision in *Federal Savings and Loan Insurance Corporation v. The Superior Court of San Joaquin County,* 180 Cal.App.3d 336, ____ Cal.Rptr. ____ (1986), whereby the Court of Appeal granted the Federal Savings and Loan Insurance Corporation's ("FSLIC") petition for a writ of prohibition dismissing the state court action filed by petitioner herein. The opinion of the Court of Appeal is attached hereto as Appendix "A".

STATEMENT OF JURISDICTION

The opinion and order of the Court of Appeal was filed April 25, 1986. The petition for review to the California Supreme Court filed by petitioner herein was denied July 30, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

STATUTES

12 U.S.C. § 1464(d)(6)(A-C)

The full text of the cited statute is set forth as Appendix "B".

STATEMENT OF THE CASE

In November 1982, American Savings and Loan Association ("American")[1] entered into a written contract with San Marino Savings and Loan Association ("San Marino"), a state-chartered savings and loan association pursuant to which American agreed to purchase millions of dollars in loans originated by San Marino (the "Bona-Domingues Loans"). As part of the written contract, San Marino warranted and covenanted to American that the loans being sold would have a loan-to-value ratio (the ratio that the amount of the loan bears to the value of the real property securing the loan) of 80% or less.

American paid San Marino the purchase price for the loans but discovered during 1983 that the loan-to-value ratio on virtually all of the loans delivered to it exceeded 80%. In fact, in most cases, the amount of the loan was far in excess of the value of the real property securing the loan. After obtaining appraisals of the subject properties,

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[1]American is a subsidiary of Financial Corporation of America.

American realized that it was under-collateralized by at least $17,000,000.

Unfortunately, San Marino had originated hundreds of millions of dollars in Bona-Domingues Loans, all of which were tainted by the same defect. Primarily as a result of these loans, San Marino was declared insolvent by the Federal Home Loan Bank Board (the "Bank Board") on February 3, 1984. In taking this action, the Bank Board adopted Resolution No. 84-59 and appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") as conservator of San Marino. The resolution of the Bank Board appointing the conservator expressly provided that the appointment was not for the purpose of liquidation, and that San Marino was empowered to continue to operate, i.e., to borrow money, to contract debts, and to sell its property. The resolution of the Bank Board is attached as Appendix "C".

On September 21, 1984, American filed a complaint against San Marino in the Superior Court of the State of California in and for the County of San Joaquin seeking damages for breach of contract in the amount of approximately $17,000,000. On October 12, 1984, the Superior Court issued to American a $14,000,000 writ of attachment to secure American's breach of contract claim. The writ was issued and levied on assets of San Marino *before* the end of October 1984.

On December 6, 1984, *after* the aforesaid levy, the Bank Board, by two separate resolutions, placed San Marino in receivership, appointed FSLIC as receiver for San Marino and directed FSLIC to liquidate the assets of San Marino. These resolutions, Nos. 84-706 and 84-707, are attached as Appendices "D" and "E", respectively.

Prior to the institution of the receivership, FSLIC caused American's suit to be removed to the United States District Court for the Eastern District of California, claiming that a substantial federal question existed. American brought on a motion to remand which was granted. The district court found that "the federal issues, if any" in this action "are not substantial or material," but are rather "purely incidental or tangential to the state-law claims." In addition, the federal court in Sacramento rejected San Marino's contention that FSLIC rather than San Marino was the real party in interest in the case and ruled that the action involves "only the rights and obligations of San Marino Savings and Loan Association and plaintiff American as a creditor of San Marino under state law." Further, the district court ruled that,

> "Based upon such finding, the Court *holds* that the question of federal jurisdiction over this cause is governed by 12 U.S.C. Section 1730(k)(1)(C) and that the proviso to such section applies to this cause such that there is no ground for federal jurisdiction over this cause." (Emphasis in original)

The order of the district court is attached as Appendix "F".

On December 27, 1984, after remand to the trial court, FSLIC filed a motion to dismiss and attempted to argue that the commencement of and effect of the receivership applied retroactively to the issuance of the writs in October, 1984 and, by virtue thereof, American's action must be dismissed pursuant to 12 U.S.C. § 1464(d)(6)(C). FSLIC further argued that the receivership invoked a panoply of administrative procedures which must be exhausted, leading to the dismissal of

American's action and the consequent destruction of its security interest resulting from the attachment liens.

As FSLIC was well aware, the dismissal of American's action would result in the termination of American's attachment liens and reduce American to the position of an unsecured creditor of an insolvent institution.

Concurrently with its motion to dismiss, FSLIC also filed a motion to set aside the right to attach order issued by the trial court, to quash the writs of attachments and to release the attached property. The motion did not attack the underlying merit of American's claims or contest that American had suffered millions of dollars in damages as a result of San Marino's breach.

On May 23, 1985, the Superior Court issued an opinion and tentative order denying both FSLIC's motion to dismiss and its motion to set aside the right to attach order. On May 28, 1985, the Superior Court issued a formal order denying both of FSLIC's motions.

Thereafter, FSLIC filed a petition for a writ of prohibition to the California Court of Appeal, Third Appellate District, seeking to reverse the trial court's denial of FSLIC's motion to dismiss. On April 25, 1986, the Court of Appeal filed its opinion which ordered the issuance of a peremptory writ of prohibition directing the trial court to dismiss the action and to discharge American's attachment liens. The opinion of the court below is attached as Appendix "A".

It is critical to note that FSLIC's petition for a writ of prohibition did not attack the trial court's ruling denying FSLIC's motion to set aside the attachment liens which were created *before* the commencement of the receivership. As FSLIC pointed out, those liens were declared valid by the trial court and FSLIC had a statutory right

of appeal, separate from its petition for an extraordinary writ, to question the appropriateness of that ruling. Thus, for purposes of FSLIC'S petition to the Court of Appeal as well as this Petition, the attachment liens must be deemed valid.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEAL'S NULLIFICATION OF AMERICAN'S LIENS HAS NO CONGRESSIONAL AUTHORITY TO SUPPORT IT. THE COURT OF APPEAL MAY NOT DESTROY AMERICAN'S SECURITY INTEREST BY HOLDING THAT AMERICAN WILL THEREAFTER HAVE A "PRIORITY" CLAIM IN THE RECEIVERSHIP.

The opinion of the Court of Appeal concedes that American's attachment liens constitute compensable property rights. Indeed, the United States Supreme Court has held that attachment liens have an existence "apart from" the underlying claims which they secure. *Dames & Moore v. Regan*, 453 U.S. 654, 675, 69 L.Ed.2d 918, 101 S.Ct. 2972 (1981).

The Court of Appeal also recognized that the dismissal of American's action must result in the destruction of American's attachment liens. By ordering the dismissal of American's liens and rerouting American's claims to the administrative track, the Court of Appeal has sanctioned the nullification and destruction of American's valid attachment liens.

An exhaustive search of the statutes and administrative regulations concerning FSLIC reveals nothing which permits the nullification, avoidance or destruction of state-created valid attachment liens which were in existence

prior to the commencement of receivership. If Congress, to assure the speedy replenishment of the insurance fund administered by FSLIC, wished to nullify and void attachment liens created before receivership (or within a fixed number of days prior thereto as is the case in bankruptcy), it must have said so clearly and explicitly.

FSLIC misled the Court of Appeal by asserting: "Congress has charged FSLIC as receiver with the responsibility of receiving, considering, and accepting, compromising or rejecting, claims against the assets of failed federally insured institutions," referring the Court of Appeal only to 12 U.S.C. § 1729(d) as authority for such a sweeping congressional grant of power. That statute only provides that, in the event "liquidation" is directed by the Bank Board, FSLIC may "settle, compromise, or release claims in favor of or against the insured institution." There is nothing in this statute or any other bestowing on FSLIC the power to nullify valid liens.

The power to "settle" or "compromise" does not even support the power to adjudicate the validity of claims; it means only that FSLIC may negotiate a settlement or compromise of claims against the institution, a typical receivership power. Even more remote, the power to "release" claims must refer only to claims in favor of, as opposed to against, the institution.

From this sparse statutory authority to "settle" or "compromise" claims, the Bank Board has promulgated, by administrative regulation only, a claims process including provisions for the presentment, consideration, allowance or disallowance of claims and claims of security. It is this body of administrative regulation upon which the Court of Appeal rests its decision that American must now take the administrative route.

These regulations however, do not permit the nullification or destruction of liens but require the *allowance* of liens which are valid. The Bank Board's Resolution No. 84-707 appointing FSLIC as receiver and instructing it to liquidate San Marino requires that the receiver "recognize" valid security interests and establishes that their validity must be determined under California state law:

> **"Claims Procedure**
>
> • • •
>
> [T]he Receiver is directed to approve claims and allow or disallow claims of security, preference or priority in accordance with the Federal Regulations and the following:
>
> **"Secured Claims**
>
> • • •
>
> "(c) A claim to security shall be recognized by the Receiver to the extent that, under the laws of the State of California, such creditor claim is secured by, or constitutes a lien on, assets or property of any kind of the association or in which the association has an interest; . . ."

Thus, the Bank Board's own resolution is fully consistent with the long established rule of this Court that a receiver takes property subject to valid attachment liens:

> "It seems to be the impression of counsel for the applicants for the writ of review that they have a lien acquired by the levy of the writ of attachment on the property seized which will be lost if the property is turned over to the receiver. This is an entire misapprehension of the law. The appointment of a receiver works no injury to the least right of anyone. It would

> be strange if it did. The receiver is the hand of the law, and the law conserves and enforces rights — never destroys them. If the applicants have any lien the receiver holds the property subject to such lien as fully as did the sheriff; and if such property is sold by the receiver, whatever lien exists attaches to the proceeds."

Von Roun v. Superior Court, 58 Cal. 358 359-360 (1881).

Until December 6, 1984, FSLIC and San Marino was continuing to operate; making loans, accepting deposits and dealing with its property as a proprietor and not as a liquidator. Given that status, San Marino continued, at least until FSLIC was appointed as receiver December 6, to be subject to attachment liens:

> "If respondents' contention is sound, until suit is brought [commencing the liquidation process] the association may continue its business, borrow money, contract debts, sell its property, though insolvent, while a creditor is denied the right to resort to the writ of attachment to secure payment of its just demands. It is well settled that the property of insolvent private corporations is subject to attachment — a fact distinctly recognized by the amended Bank Commissioners Act — and we see no ground to distinguish between building and loan associations and other private corporations in this regard in the absence of a statute creating a distinction either by express provisions or by necessary implications.
>
> "It follows that *the real estate attached by appellant is charged in the hands of the receiver with her attachment lien,* and that the order dissolving the attachment should be reversed."

Bories v. Union Building and Loan Association, 141 Cal. 74, 78-79, 79 P. 552 (1903). (Emphasis added.)

The Court of Appeal rejected the notion that American's liens survive the appointment of a receiver. In doing so, it relied solely upon 12 U.S.C. § 1464(d)(6)(C), which provides only that: "[N]o court may . . . except at the instance of the [Bank] Board, restrain or affect the exercise of powers of functions of a conservator or receiver." This statute is of no use to FSLIC on the question of the destruction of valid liens. FSLIC concedes that the statute does not bar a court from considering a claim during conservatorship and *before* receivership. As FSLIC has admitted:

> "Although 12 U.S.C. Section 1464(d)(6)(C) also applies to conservatorships, federal regulations provide a formal claims process only for receiverships. No such claims process exists for conservatorships. For that reason, FSLIC, as conservator, did not attempt to cast claimants out of court when they had no other forum."

If destruction and nullification of valid, prereceivership liens is desired, Congress must speak loudly and clearly in advance of the creation of those liens, so that the holder of a lien is aware, at its creation, that it is capable of being defeated, nullified or otherwise destroyed under clearly defined circumstances. All lawyers are familiar with the well known "voidable preference" rule of the Bankruptcy Code which provides that certain liens obtained within three months before the filing of a bankruptcy petition may be nullified or avoided. Nothing is left to implication or construction; Congress clearly states in the bankruptcy laws that judicial liens obtained within three months of the filing of a bankruptcy petition may be nullified or avoided. No such identical or analogous preference law exists in the FSLIC receivership statutes.

Thus, even assuming that the Court of Appeal is correct that § 1464(d) reroutes American to the administrative track for initial resolution of its claims, the appropriate course is to abate, rather than dismiss, American's suit, and thus preserve its liens pending determination of the validity of the claims. The Court of Appeal, however, declares that dismissal is compelled because the maintenance of the lien is a "restraint" on FSLIC's power to liquidate assets, sell them free of liens, and then divide and distribute the proceeds as it sees fit.

However, the power to liquidate does not mean or include the power to destroy valid liens. There can be no distinction between judicial or consensual liens in this regard. Certainly FSLIC would not suggest that it may set aside a disputed trust deed *before* a determination of its validity, sell the property free of the trust deed, divide and distribute the proceeds, and then later grant a "priority" claim — not a security interest — to the former holder of the trust deed which is subsequently determined to have been a valid encumbrance.

Nonetheless, this sleight of hand is precisely how the Court of Appeal has attempted to finesse the destruction of American's liens, for the Court of Appeal holds:

> "Even though American's attachment will be discharged as a result of the dismissal of its action, American will still have the opportunity to present a claim for security (in effect for priority) in the liquidation of San Marino to the extent of the proceeds received from the sale of the previously attached property. If American's claim is not fully satisfied, it may then seek just compensation for the difference between the amount of the assets awarded and the amount of the assets previously under attachment."

The loss of American's security interest in specific property cannot be cured by granting it a "priority", unsecured claim in an insolvent estate. Security is not priority; the former assures payment out of identifiable property or its proceeds in the event a claim is proved to be valid, the latter assures nothing. After dismissal and discharge, American may well prove up its claim and its claim of security and yet recover nothing, as the Court of Appeal was forced to acknowledge.

With all due respect, the Court of Appeal's answer to this dilemma (i.e., that American may later "seek just compensation" from the same insolvent estate which is unable to pay its initial claim) is fatuous.

Finally, there is nothing in the statutes, regulations or resolutions of the Bank Board which describe the particular "priority" to be received by one holding a valid but dissolved security interest. The Bank Board's resolution instructing FSLIC to liquidate San Marino lists the usual types of unsecured claims — administrative expenses, wages, taxes, etc., and describes their relative priorities but, the regulations do not address the type of priority which American would allegedly receive.

II

FSLIC'S APPOINTMENT AS RECEIVER DOES NOT STRIP THE STATE COURTS OF JURISDICTION TO CONSIDER CASES WHICH INVOLVE ONLY THE RIGHTS AND OBLIGATIONS OF A STATE-CHARTERED INSTITUTION AND A CREDITOR OF THAT INSTITUTION AND WHICH INVOLVE ONLY QUESTIONS OF STATE LAW.

In its return filed with the Court of Appeal, American urged the application of 12 U.S.C. § 1730(k)(1), as con-

stituting express Congressional authority for the retention by states of jurisdiction over actions which involve only the rights and obligations of a state-chartered institution and a creditor of the institution and which involve only questions of state law. American argued:

> "Most significantly, this federal statute (12 U.S.C. § 1730(k)(1)) which is an integral part of the FSLIC statutory scheme, explicitly provides for adjudication in state court of state law claims against state-chartered associations under a FSLIC receiver."

The relevant portion of this statute provides as follows:

> "*Provided*, that any action, suit or proceeding to which the Corporation [FSLIC] is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States."

As stated herein, the district court held that American's action fell squarely within the quoted proviso of § 1730(k)(1):

> "[T]his action involves only the rights and obligations of San Marino Savings and Loan Association and plaintiff as a creditor of San Marino under state law. Based upon such finding, the court *holds* that the question of federal jurisdiction over this cause is governed by 12 U.S.C. § 1730(k)(1)(C) and that the proviso to such section applies to this cause such that there is no ground for federal jurisdiction over this cause." (Emphasis in original)

This determination by the federal district court thus renders this case distinguishable from that before the Fifth Circuit Court of Appeals in *North Mississippi Savings and Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir, 1985) *cert. den.*, 106 S. Ct. 790 (1986), the very case upon which the Court of Appeal erroneously based its dismissal of American's action herein. In *Hudspeth*, the Fifth Circuit considered whether the proviso of § 1730(k)(1) was applicable there, and concluded it was not:

> "The § 1730(k)(1) proviso cited by Hudspeth excepts from the statute's general grant of federal jurisdiction actions where two conditions are both present: (1) only the rights or obligations of investors, creditors, stockholders, and a State-chartered institution in FSLIC receivership or conservatorship are at issue, and (2) only questions of state law are involved. Hudspeth, though, sued and demanded damages from New North, a federally-chartered institution that was neither an investor, creditor, nor stockholder of Old North. Hudspeth's action asked the court to determine New North's rights and obligations, and thus was not governed by the proviso."

In the instant case, the Court of Appeal below clearly rejected American's contention that state courts have continuing jurisdiction to adjudicate state law claims against failed state-chartered associations placed into receivership:

> "We therefore conclude that [upon appointment of FSLIC as receiver] state courts have been stripped of any jurisdiction to hear claims against assets of the failed association; any claim against the association must therefore be 'switched to the administrative track.' ".

American does not assert merely that the Court of Appeal has misapplied a federal law or has simply committed error in this particular case. Rather, American contends that the holding of the Court of Appeal establishes a precedent which must be reviewed by this Court. By holding that the adjudication of claims in state court against a state chartered association in receivership with FSLIC as the sole federal receiver is a "restraint" in violation of § 1464(d)(6)(C), the Court of Appeal effectively repeals 12 U.S.C. § 1730(k)(1). Such a result requires this Court's consideration.

III

HUDSPETH I CORRECTLY DECLARED THAT ALL CLAIMS ARISING OUT OF PRE-RECEIVERSHIP CONDUCT MAY BE JUDICIALLY ESTABLISHED.

American urged upon the Court of Appeal the reasoning and conclusion of the Fifth Circuit Court of Appeals' *first* decision in *Hudspeth* (Hudspeth I) (attached as Appendix "G"), which held that the courts, and not FSLIC, have the power to adjudicate all pre-receivership claims. FSLIC relied instead on the revised opinion of the court in *North Mississippi Savings v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985) *cert. den.*, 106 S.Ct. 790 (1986) ("Hudspeth II"), holding that FSLIC, and not the courts, possesses that adjudicatory power. American urges the Court to reconsider *Hudspeth* on the following grounds.

Hudspeth I rested upon several United States Supreme Court decisions in the areas of equitable receiverships, insurance liquidation and bankruptcy, all of which concluded that a receiver's power of liquidation and distribution did not include the adjudication of the underlying debt. *Riehle v. Margolies*, 279 U.S. 218, 73 L.Ed. 669, 49

S.Ct. 310 (1929); *Morris v. Jones*, 329 U.S. 545, 91 L. Ed. 488, 67 S.Ct. 451 (1947); *Underwriters Nat'l. Assur. Co. v. North Carolina Life et al.*, 455 U.S. 691, 71 L.Ed. 558, 102 S.Ct. 1357 (1982). *Hudspeth I* also examined the two relevant federal statutes [12 U.S.C. §§ 1729(b)(1)(B) and 1729(d)] and held that "[b]oth sections imply that the FSLIC cannot unilaterally resolve the merits of claims." *Hudspeth II*, by contrast, cites no statutory or case authority to support the court's revised opinion, and rests its adoption of adjudicatory powers in FSLIC *entirely* on regulations promulgated by the Bank Board.

The "policy" ostensibly adopted by *Hudspeth II* (and by the court below) is that judicial prosecution of claims will *delay* FSLIC's adjudication and liquidation, that delay is a "restraint" prohibited by § 1464(d)(6)(C), and that the FSLIC insurance fund is endangered by such delay.

FSLIC however has admitted that judicial review is available *after* determination by the agency. If *Hudspeth II* is correct that judicial action is a "restraint" prohibited by § 1464(d)(6)(C), then the statute must also be construed to bar judicial review following administrative action, since judicial review will also delay liquidation.

More significantly, it is not for the courts to patch a perceived crack in the Congressional fabric. If Congress itself finds that there exists a need to protect the FSLIC insurance fund from depletion, it has many ways to repair the problem (including increased assessments from members). The courts should not attempt to judicially legislate the correct remedy.

IV

UPON LEVY OF THE OCTOBER ATTACHMENTS WHICH PRECEDED THE DECEMBER RECEIVERSHIP, THE SUPERIOR COURT ACQUIRED EXCLUSIVE JURISDICTION TO DEAL WITH THE PROPERTY THAT CAME INTO ITS POSSESSION, CUSTODY AND CONTROL, AND NO OTHER COURT OR AGENCY, STATE OR FEDERAL, LATER CLAIMING JURISDICTION OVER THE SAME ASSETS, MAY DISTURB THE JURISDICTION OF THE SUPERIOR COURT.

Upon levy, the Superior Court acquired possession, custody and control of over $10,000,000 of San Marino's (not FSLIC's) assets, and no other court or agency may disturb that custody:

> "[W]hen a court of competent jurisdiction has obtained possession, custody, or control of property, that possession may not be disturbed by any other court. A typical case would be one of actual seizure of property under process of a court. . . ."

Wright and Miller, *Fed. Prac. & Proc.*, § 3631 (1978).

Attachment is just such a seizure by which a court comes into possession of property and thereby gains exclusive jurisdiction to deal with the property. *Covell v. Heyman*, 111 U.S. 176, 28 L.Ed. 390, 4 S.Ct. 355 (1884).

> [W]hen property is taken and held under process . . . of a court of the United States, it is in the custody of the law and within the *exclusive* jurisdiction of the court from which the process has issued for the purposes of the writ; the possession of the officer cannot be disturbed by process from any State Court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is

> held, and to violate the law which that jurisdiction is appointed to administer. . . . And vice versa the same principle protects the possession of property while thus held by process issuing from state courts against any disturbance under process of the courts of the United States. . . ."
>
> * * *
>
> "Property thus levied upon by attachment, or taken in execution, is brought by the writ within the scope of the jurisdiction of the court whose process it is, and as long as it remains in the possession of the officer it is in the custody of the law."

28 L.Ed. at 393.

This principle has been confirmed in an unbroken line of cases spanning a century. *See e.g., Farmers Loan and Trust Co. v. Lake St. Elevated R. Co.,* 177 U.S. 51, 61, 44 L.Ed. 667, 20 S.Ct. 564 (1900); *Kline v. Burke Construction Co.,* 260 U.S. 226, 229, 67 L.Ed. 226, 43 S.Ct. 79 (1922); *Donovan v. City of Dallas,* 377 U.S. 408, 412, 12 L.Ed.2d 409, 84 S.Ct. 79 (1964).

The answer of the Court of Appeal to the application of this venerable principle to the case at bar is that it pertains only to courts with concurrent jurisdiction and that "here, the state court had *no* subject matter jurisdiction."

By this, the Court of Appeal engages in bootstrapping. Given FSLIC's admission that an administrative process did not exist during conservatorship, it is beyond dispute that the state court did have jurisdiction when the action was commenced and when the attachments were levied. Under the principle described in the cases cited above, that jurisdiction, once it attached, was to remain exclu-

sive. The opinion of the Court of Appeal is in conflict with this principle, and should be reviewed by this Court.

V

AMERICAN IS EXCUSED FROM EXHAUSTING THE ADMINISTRATIVE REMEDIES WHICH WERE CREATED BY FEDERAL REGULATION ONLY AND WHICH ARE NOT "STATUTORILY SPECIFIED" ADMINISTRATIVE PREREQUISITES.

The ultimate holdling of *Hudspeth II* and of the Court of Appeal below is that Section 1464(d)(6)(C) "prevents [a litigant] from going forward in any court before seeking FHLBB [Bank Board] review." Under this construction the statute requires exhaustion of administrative remedies before resort may be had to court; the Court of Appeal notes that resort to judicial review *after* agency action is allowed.

American contends that it is excused from the rule of exhaustion by several well-known exceptions, none of which were disputed by FSLIC. Namely, that American would suffer prejudice if its present action were dismissed and its attachments dissolved; that recourse to the federal agency was futile; that no administrative remedy existed when the instant action was commenced and the attachments were issued and levied; that FSLIC has waived any claim that American must exhaust its administrative remedies; and that the rationale for the doctrine of exhaustion of remedies is inapplicable in the case at bar.

FSLIC responded to this contention by arguing that these exceptions do "not apply to an exhaustion requirement that is a 'statutorily specified jurisdictional prerequisite' ". The Court of Appeal adopted FSLIC's position.

In order for an exhaustion requirement to constitute a "statutorily specified jurisdictional prerequisite", Congress must, first, expressly provide for the administrative remedy and, second, require clearly and explicitly that the remedy be exhausted before resort may be had to a court's jurisdiction.

> "If Congress has expressly made federal court jurisdiction to review a claim subject to an exhaustion requirement, then an unexhausted claim must be dismissed."

I.A.M. Nat. Pen. Fund v. Schulze Tool & Die, 564 F.Supp. 1285, 1291 (N.D. Cal. 1983).

In the case at bar, there is no *statute* by which Congress expressly created an administrative remedy, and it is apparent that the Bank Board established the administrative procedures from the implied, rather than the express, provisions of the FSLIC receivership statutes. Moreover, § 1464(d)(6)(C) does not purport to "expressly" require exhaustion of any express statutory administrative remedy. Thus, American is not required to exhaust the administrative procedures promulgated by the Bank Board.

CONCLUSION

The Court of Appeal establishes a dangerous precedent by holding that Section 1464(d)(6)(C) sets forth a jurisdictional prerequisite of exhaustion of administrative remedies. This Court should review that decision.

Dated: October 23, 1986.

Respectfully submitted,

RICHARD H. COOPER
GRANT K. RILEY
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COOPER & KLEIN
Attorneys for American
Savings and Loan Association

APPENDIX A

Opinion of the Court of Appeal, Third Appellate District.

CERTIFIED FOR PUBLICATION

- C O P Y -

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

(San Joaquin)

3 Civil 25304
(Super. Ct. No. 179526)

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION ETC.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN JOAQUIN COUNTY,

Respondent;

AMERICAN SAVINGS AND LOAN ASSOCIATION,

Real Party in Interest.

Filed April 25, 1986.

ORIGINAL PROCEEDINGS; application for a peremptory writ of prohibition. Writ issue.

Tuttle & Taylor Incorporated, A. James Roberts III, C. Stephen Howard, Jeffrey M. Hamerling, David B. Babbe, Norman H. Raiden, Ralph W. Christy, and William K. Black for Petitioner.

No appearance for Respondent.

Richard H. Cooper, William H. Jennings, Grant K. Riley, Freshman, Marantz, Orlanski, and Comsky & Deutsch for Real Party in Interest.

Federal Savings and Loan Insurance Corporation (FSLIC) as receiver for San Marino Savings and Loan Association (San Marino) seeks a peremptory writ of prohibition restraining respondent superior court from proceeding further on a complaint filed against San Marino and directing respondent to dismiss the action for lack of subject matter jurisdiction. We shall grant the request.

The FSLIC is an agency and instrumentality of the United States, operated and directed by the Federal Home Loan Bank Board (Bank Board). (12 U.S.C. §§ 1725, 1730.)[1] It has been charged by Congress with responsibility for insuring accounts of eligible state chartered savings and loan associations, various savings banks, and all federal savings and loan associations. (§§ 1725(a), 1726(a).) In addition, the FSLIC may be appointed by the Bank Board to serve as conservator or receiver of any troubled insured institution. (§§ 1464(d)(6)(A), 1729(c).)

San Marino was a state chartered savings and loan association whose accounts were insured by the FSLIC pursuant to 12 United States Code section 1726. In February 1984, the Bank Board adopted a resolution placing San Marino in conservatorship and appointing the FSLIC as sole conservator for San Marino. Pursuant to that resolution, the FSLIC took possession of the assets and property of San Marino and, by operation of federal law, assumed "all the powers of the members, the directors, and the officers of the association." (§ 1464(d)(6)(D).)

In September 1984, while San Marino was in conservatorship, American Savings and Loan Association (Ameri-

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[1]Unless otherwise indicated, all further section references are to 12 United States Code.

can) filed a complaint against San Marino seeking damages for breach of contract. American's action arose out of the purchase of loans originated by San Marino prior to its conservatorship. Pursuant to American's request, respondent court issued a $14.2 million writ of attachment to secure American's claim against San Marino.[2] On December 6, the Bank Board by two separate resolutions placed San Marino in receivership, appointed the FSLIC as receiver for San Marino, and directed the FSLIC to liquidate the assets of San Marino in an orderly manner.

Thereafter, petitioner filed a motion for judgment on the pleadings, seeking dismissal of the action, asserting respondent lacked subject matter jurisdiction to adjudicate the action by virtue of the provisions of section 1464(d)(6)(C), and a motion to set aside an attachment order obtained by American ex parte and without notice on the basis that such attachment was prohibited by sections 1730(k)(1) and 1464(d)(6)(C) and on the doctrine of *in custodia legis*. Respondent denied both motions on May 28, 1985. Two days later, petitioner filed a fifth supplemental memorandum of points and authorities in support of its motion for judgment on the pleadings or, in the alternative, a motion for reconsideration. Prior to respondent's ruling on the alternative motion for reconsideration, petitioner sought a writ of prohibition from this court. We issued an alternative writ of prohibition commanding respondent to refrain from further proceedings in the specified action.

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[2]Thereafter, San Marino sought to move the action to the United States District Court in Sacramento, claiming that the complaint raised a substantial federal question. On December 18, the Federal District Court rejected San Marino's contention and remanded the action to respondent.

DISCUSSION

Petitioner argues respondent lacks subject matter jurisdiction over the action against San Marino. Pursuant to its statutory authority under the National Housing Act (§ 1701 et seq.), the Bank Board has established an administrative process for resolving claims against failed savings and loan associations placed in receivership under the auspices of the FSLIC, including claims against such associations by creditors entitled to security or priority in such receiverships. (See 12 C.F.R. §§ 549.4, 549.5, 549.5-1, 569a.7, 569.8, and 569a.9 (1985).) To ensure that all claims against a failed savings and loan association placed in receivership are expeditiously resolved in a single forum, Congress has provided in section 1464(d)(6)(C) that: "[N]o court may . . . except at the instance of the [Bank] Board, restrain or affect the exercise of powers or functions of a conservator or receiver." Section 1729(d) further provides: "In connection with the liquidation of insured institutions, the [FSLIC] shall have power . . . to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the [Bank Board], . . ." (See § 1729(c)(3).)

American argues the adjudication of claims against a debtor, as opposed to the allocation of assets to satisfy those cliams, is not a receivership function. That argument was expressly rejected in North Mississippi Sav. & Loan Ass'n v. Hudspeth (5th Cir. 1985) 756 F.2d 1096.[3] In *Hudspeth,* the court considered application of sections 1464(d)(6)(C) and 1729(d) to a counterclaim filed against a savings and loan association prior to the ap-

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[3]Prior to its modification on May 23, 1985, *Hudspeth* had agreed with American's contention.

pointment of the FSLIC as receiver. In affirming the district court's dismissal of Hudspeth's claim, that court stated, "resolution of even the facial merits of claims outside of the statutory reorganization process would delay the receivership function of distribution of assets: . . . Given the overriding Congressional purpose of expediting and facilitating the FSLIC's task as receiver, such a delay is a 'restraint' within the scope of the statute [section 1464(d)(6)(C)]." (*Id.*, at p. 1102.) The court emphasized that the legislative history of section 1464(d)(6)(C) confirms that "Congress wanted the FSLIC to be able to act quickly and decisively in reorganizing, operating, or dissolving a failed institution, and intended that the FSLIC's ability to accomplish these goals not be interfered with by other judicial or regulatory authorities."[4] (*Id.*, at p. 1101.)

American contends the argument that judicial prosecution of claims will delay the FSLIC's liquidation and thus restrain its function as a receiver is fatuous. It argues the FSLIC is precluded from a claim of injury by delay in this case since the FSLIC itself has stayed the proceedings in American's court action. We disagree. Whatever contribution to the delay in the liquidation process by the FSLIC stemmed from its participation in American's litigation. Delays in the judicial proceeding could have been avoided if the FSLIC had been permitted at the outset to settle American's claim pursuant to section 1729(d). Furthermore, there is nothing in the statutes

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[4]American argues the reasoning of *Hudspeth* is inconsistent with the right to judicial review following the FSLIC's determination of a claim. We think not. A review of the administrative resolution of the claim is necessary to ensure the proper exercise of administrative power. Congress apparently concluded that the expedition of claims in a liquidation proceeding did not warrant an exemption from the safeguards of the Administrative Procedure Act.

governing the receiver's powers and functions to indicate their application on a case by case basis. (§§ 1464(d)(6)(C), 1729(d).) Instead, such statutes were obviously meant to enhance the overall ability of the FSLIC to speedily settle creditors claims.

American's contention that its action does not interfere with the liquidation process is specious. It argues that the FSLIC is not prevented from immediately liquidating the assets subject to American's lien and holding the proceeds from the sale of such property until the resolution of its claim. American apparently ignores the fact the FSLIC is also responsible for the distribution of the liquidated assets. Since the FSLIC cannot determine how to divide the assets until the termination of American's action, that action constitutes a "restraint" of the receiver's function.

American also raises the Federal District Court case of Gibraltar Bldg. & Loan v. State Sav. & Loan Ass'n (N.D.Cal. 1985) 607 F.Supp. 722, decided May 2, 1985, as support for the view that a pre-receivership claim may be judicially established. The *Gibraltar* decision, however, was predicated on the earlier *Hudspeth* decision, which had initially agreed with American's contention that the receiver's power of liquidation and distribution did not include the adjudication of the underlying debt. Since *Hudspeth* was modified, American's reliance on *Gibraltar* is wasted.

American next argues that regardless of the correctness of *Hudspeth,* its suit against San Marino is distinguishable because it had acquired a $14.2 million writ of attachment against San Marino prior to the establishment of the receivership and that such writ vested respondent with exclusive jurisdiction over the attached property. American attempts to draw an analogy to bankruptcy cases prior to the enactment of the 1978 Bankruptcy Code

(11 U.S.C. § 101 et seq.) for the proposition that respondent cannot be ousted of jurisdiction over property that is the subject of a writ of attachment. We conclude the legislative purpose behind the enactment of statutes governing liquidations by the FSLIC renders those cases inapposite.[5]

It is clear that Congress intended to give the FSLIC, acting as receiver of an insolvent association, *exclusive* authority to resolve creditor's claims in order to facilitate speedy liquidation. The FSLIC is responsible for each insured account of a failed association for an amount up to $100,000. (§ 1728.) Because "[t]imely . . . payments [to account holders] are vital, not only as a matter of equity . . . but also to preserve the confidence of the public at large in the safety and stability of savings and loan associations," the FSLIC is authorized to make insurance payments to all savings account holders when appointed as receiver for liquidation. (Sen. Rep. No. 1263, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S. Code Cong. & Admin. News, at p. 2540; § 1729(b)(2).) Such payments generally entitle the FSLIC to a claim of at least 95 percent of the assets of the failed association. (1968 U.S. Code Cong. & Admin. News, at pp. 2531, 2536.) Congress has recognized that "The reserves of the FSLIC

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[5]American raises the argument that where two courts have jurisdiction to adjudicate claims to certain property, the court first acquiring possession over the property has exclusive jurisdiction. Petitioner's response is that the authorities cited by American pertained to courts with concurrent or limited jurisdiction (as in bankruptcy cases prior to 1978) and thus were inapposite; here, the state court had *no* subject matter jurisdiction. Petitioner argued that under the new Bankruptcy Code, as amended in 1984, the court presiding over bankruptcy *now* has *exclusive* jurisdiction over all property of the debtor without regard to the fact that such property might be involved in other legal proceedings. (See 28 U.S.C. § 1334(d); 11 U.S.C § 541(a).)

are not unlimited and cannot stand an indefinite repetition of unrecovered receiverships. Moreover, the [FSLIC] cannot afford to have huge amounts of its capital tied up indefinitely at zero interest without increasing insurance premiums to the entire industry." (*Id.*, at p. 2537; fn. omitted.) Since the FSLIC would not be able to divide the assets of the failed association and recoup its insured payments until the resolution of all disputed claims (see *Hudspeth, supra*, 756 F.2d at p. 1102), Congress conferred exclusive authority to the FSLIC in liquidation proceedings in order to aid in the maintenance of FSLIC insurance reserves. (See 1968 U.S. Code Cong. & Admin. News, at p. 2537.)

Hudspeth concluded that federal statutes (§§ 1464(d)(6)(C) and 1729(d)) have clearly occupied the field with respect to the liquidation of federally insured associations. We agree with *Hudspeth's* reasoning and conclusion. We therefore conclude that state courts have been stripped of any jurisdiction to hear claims against assets of the failed association; any claim against the association must therefore be "switched to the administrative track." (*Hudspeth, supra*, 756 F.2d at p. 1103.)

It is undisputed that the dismissal of American's action will result in the nullification of its attachment. American argues that absent a provision expressly authorizing the destruction of valid liens in receivership liquidations, the FSLIC should not be vested with such power. We disagree. The failure to dismiss the court action by virtue of the writ of attachment would surely be a "restraint" of the receivership function. Such restraint has been expressly prohibited by Congress. (§ 1464(d)(6)(C).) To permit respondent to adjudicate the claim because American had attained a writ of attachment prior to receivership would frustrate congressional intent to aid the FSLIC in maintaining its insurance reserves. As pointed

out by American, it was the very threat of potential receivership which impelled it to seek attachment relief from the court. If American was permitted to secure jurisdiction in state court by virtue of a writ, it is conceivable that a flood of applications for writs of attachment would be instigated by creditors of floundering institutions, i.e., those placed in conservatorship. The impact of such action would virtually remove the FSLIC's authority, upon appointment as receiver, to settle claims in a liquidation proceeding and result in immeasurable delays and damage.

In a related argument, American contends the destruction of the writ of attachment constitutes an unlawful taking without just compensation. The argument, premised on the assertion that the nullification of American's lien would reduce it to the status of an unsecured creditor, is meritless.

We initially note that American has not established a secured claim. The writ of attachment is merely a device by which American seeks to gain preference over *other unsecured* creditors. (See Title Ins. etc. Co. v. California Dev. Co. (1915) 171 Cal. 173, 216.) Although we acknowledge an attachment entitling a creditor to resort to specific property for the satisfaction of a claim is a compensable property right (Armstrong v. United States (1960) 364 U.S. 40 [4 L.Ed.2d 1554]; Louisville Joint Stock Land Bank v. Radford (1935) 295 U.S. 555 [79 L.Ed. 15]), the question of whether or not the nullification of American's attachment constitutes an unconstitutional taking is not ripe for review.

Here, the dismissal of American's suit will not result in the loss of its opportunity to gain a priority claim; the resolution of that claim will simply be transferred to an administrative forum. The FSLIC, as receiver, is empowered to consider all claims for security. (See 12 C.F.R.

§§ 549.4, 549.5, 549.5-1, 569a.8 (1985).) As American has pointed out, the FSLIC has been specifically directed in this case to recognize a claim for security to the extent that a creditor's claim constitutes a valid lien on the property of San Marino. Even though American's attachment will be discharged as a result of the dismissal of its action, American will still have the opportunity to present a claim for security (in effect for priority) in the liquidation of San Marino to the extent of the proceeds received from the sale of the previously attached property. If American's claim is not fully satisfied, it may then seek just compensation for the difference between the amount of the assets awarded and the amount of assets previously under attachment. Since the merits of American's claim has not been determined, the allegation of an unconstitutional taking of property is premature. (Cf. Dames & Moore v. Regan (1981) 453 U.S. 654, 688-690 [69 L.Ed.2d 918, 945-946].)

Finally, American argues respondent's jurisdiction to adjudicate its claim cannot be set aside for failure to exhaust administrative remedies. It contends exceptions to the general rule of exhaustion of administrative remedies exists in the present case since: (1) dismissal of its action would result in irreparable injury; (2) the pursuit for administrative relief would be futile; (3) petitioner has waived the argument of exhaustion of administrative remedies by failure to raise that issue at the earliest possible occasion; and (4) administrative remedies did not exist at the time of the filing of the action.

It is well settled in this state that "a litigant must invoke and exhaust an administrative remedy provided by statute before he may resort to the courts. Jurisdiction to entertain an action for judicial relief is conditioned upon a completion of the administrative procedure. [Citation.]" (United States v. Superior Court (1941) 19 Cal.2d

189, 194.) Although exceptions to the rule of exhaustion have been established, they do "not apply to an exhaustion requirement that is a 'statutorily specified jurisdictional prerequisite.' [Citation.] Statutory exhaustion requirements 'may call into play constitutional concerns of separation of powers, and failure to adhere to them necessarily defeats jurisdiction.' [Citation.] If Congress has expressly made federal court jurisdiction to review a claim subject to an exhaustion requirement, then an unexhausted claim must be dismissed." (I.A.M. Nat. Pen. Fund v. Schultze Tool & Die (N.D.Cal. 1983) 564 F.Supp. 1285, 1291.)

Section 1464(d)(6)(C) sets forth a jurisdictional prerequisite. The right to judicial review vests only *after* completion of the administrative action. (See *Hudspeth, supra,* 756 F.2d at p. 1103.) We conclude the respondent court lacks subject matter jurisdiction to determine American's claim.

Let a peremptory writ issue, directing the respondent court to dismiss the writ of attachment previously issued upon the request of American Savings and Loan, and to dismiss the underlying action brought by American against San Marino (San Joaquin County, Superior Court No. 179526). (CERTIFIED FOR PUBLICATION.)

EVANS, Acting P.J.

We concur:

SIMS, J.

BACKUS, J.*

*Assigned by the Chief Justice.

APPENDIX B

Pertinent Statute Involved

BANKS AND BANKING

SAVINGS AND LOAN ASSOCIATIONS

(6) (A) The grounds for the appointment of a conservator or receiver for an association shall be one or more of the following: (i) insolvency in that the assets of the association are less than its obligations to its creditors and others, including its members; (ii) substantial dissipation of assets or earnings due to any violation or violations of law, rules, or regulations, or to any unsafe or unsound practice or practices; (iii) an unsafe or unsound condition to transact business; (iv) willful violation of a cease-and-desist order which has become final; (v) concealment of books, papers, records, or assets of the association or refusal to submit books, papers, records, or affairs of the association for inspection to any examiner or to any lawful agent of the Board. The Board shall have exclusive power and jurisdiction to appoint a conservator or receiver. If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein provided exists, the Board is authorized to appoint ex parte and without notice a conservator or receiver for the association. In the event of such appointment, the association may, within thirty days thereafter, bring an action in the United States district court for the judicial district in which the home office of such association is located, or in the United States District Court for the District of Columbia, for an order requiring the Board to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver. Such proceedings shall be given precedence over other cases pending in

such courts, and shall be in every way expedited. Upon the commencement of such an action, the court having jurisdiction of any other action or proceeding authorized under this subsection to which the association is a party shall stay such action or proceeding during the pendency of the action for removal of the conservator or receiver.

(B) In addition to the foregoing provisions, the Board may, without any requirement of notice, hearing, or other action, appoint a conservator or receiver for an association in the event that (i) the association, by resolution of its board of directors or of its members, consents to such appointment, or (ii) the association is removed from membership in any Federal home loan bank, or its status as an institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation is terminated.

(C) Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

(D) A conservator shall have all the powers of the members, the directors, and the officers of the association and shall be authorized to operate the association in its own name or to conserve its assets in the manner and to the extent authorized by the Board. The Board shall appoint only the Federal Savings and Loan Insurance Corporation as receiver for an association, and said Corporation shall have power to buy at its own sale as receiver, subject to approval by the Board. The Board may, without any requirement of notice, hearing, or other action, replace a conservator with another conservator or with a receiver, but any such replacement shall not affect any right which the association may have to obtain judi-

cial review of the original appointment, except that any removal under this paragraph (6) shall be removal of the conservator or receiver in office at the time of such removal.

APPENDIX C

Resolution No. 84-59

FEDERAL HOME LOAN BANK BOARD

Appointment of Conservator for
San Marino Savings and Loan Association
Under § 406(c)(1)(B)

No. 84-59

Date: February 3, 1984

WHEREAS, Pursuant to § 406(c)(1)(B) of the National Housing Act, as amended ("NHA"), 12 U.S.C. § 1729(c)(1)(B) (1982) ("§ 406(c)(1)(B)"), the Federal Home Loan Bank Board ("Bank Board") has exclusive power and jurisdiction to appoint the Federal Savings and Loan Insurance Corporation ("FSLIC") as sole conservator of an insured institution, other than a Federal association, in the event that the Bank Board determines that any of the grounds specified in § 5(d)(6)(A)(i), (ii), or (iii) of the Home Owners' Loan Act of 1933, as amended ("HOLA"), 12 U.S.C. § 1464(d)(6)(A)(i), (ii) or (iii) (1982), exist with respect to such insured institution; and

WHEREAS, San Marino Savings and Loan Association, San Marino, California ("San Marino") is an institution incorporated under the laws of the State of California, the accounts of which are insured by the FSLIC; and

WHEREAS, Pursuant to subsection (ii)(I) of § 406(c)(1)(B), the authority conferred in § 406(c)(1)(B) may be exercised without delay upon receiving the written approval by the state official having jurisdiction over San Marino that any of the grounds specified for exercising such authority exist; and

WHEREAS, Pursuant to subsection (i)(II) of § 406(c)(1)(B), in a case in which the Bank Board has exercised its power and jurisdiction under subsection (i)(I) of § 406(c)(1)(B), this FSLIC shall have the same powers and duties with respect to an insured institution other than a Federal association as are conferred upon it under § 406(b) of the NHA, 12 U.S.C. § 1729(b) (1982), with respect to Federal associations; and

WHEREAS, Pursuant to § 406(c)(3) of the NHA, 12 U.S.C. § 1729(c)(3) (1982), in any case in which the FSLIC is appointed conservator of an insured institution pursuant to § 406(c)(1), 12 U.S.C. § 1729(c)(1) (1982), the provisions of § 5(d) of the HOLA, 12 U.S.C. § 1464(d) (1982), shall be applicable in the same manner and to the same extent as if such institution were a Federal association with respect to which the FSLIC had been appointed conservator; and

WHEREAS, The Bank Board has considered a memorandum from the Director, Office of Examinations and Supervision ("OES"), dated February 3, 1984, together with accompanying attachments and exhibits (a copy of which memorandum is in the Minute Exhibit File):

Grounds of Appointment

NOW, THEREFORE, IT IS RESOLVED, That the Bank Board finds that the grounds specified in § 5(d)(6)(A)(ii) and (iii) of the HOLA exist with respect to San Marino in that: (1) San Marino has incurred substantial dissipation of assets and earnings due to violations of law, rules, and regulations and to unsafe and unsound practices; and (2) San Marino is in an unsafe and unsound condition to transact business; and

Violation of State Law

RESOLVED FURTHER, That the Bank Board finds that San Marino has violated a cease and desist order of the Commissioner, Savings and Loan Department of the State of California ("Commissioner"), dated December 4, 1983, as amended December 30, 1983, by reason of a transaction described in a letter to the Commissioner from San Marino, dated February 1, 1984 (a copy of which is attached to the memorandum of the Director, OES); and

Notice to California Official

RESOLVED FURTHER, That the Secretary or an Assistant Secretary shall cause a letter to be delivered to the Commissioner notifying him of the Bank Board's determination of the existence of grounds for the appointment of the FSLIC as sole conservator of San Marino, and requesting his written approval that the grounds specified exist, *provided* that the final form of such letter shall be approved by the Office of the General Counsel; and

RESOLVED FURTHER, That such letter shall be delivered to the Commissioner and that, upon such delivery, it shall be deemed to have been received by the official of the State of California having jurisdiction over San Marino; and

Appointment of Conservator

RESOLVED FURTHER, That the Bank Board, pursuant to § 406(c)(1)(B), hereby appoints the FSLIC as sole conservator of San Marino ("Conservator"), *provided* that the exercise of this appointment shall not be effective and this appointment shall not be exercised

unless and until an agent of the Bank Board or the FSLIC, including, but not limited to, an attorney of the Office of the General Counsel, any person named as an Assistant Secretary to the Bank Board, a Special Representative of the Conservator, or a Supervisory Agent of the Bank Board or the FSLIC, shall have received the written approval of the Commissioner that the grounds specified in § 5(d)(6)(A)(ii) or (iii) of the HOLA, 12 U.S.C. § 1464(d)(6)(A) (1982), exist with respect to San Marino; and

Powers and Duties of Conservator

RESOLVED FURTHER, That the Conservator is appointed not for the purpose of liquidation and the Conservator is hereby authorized pursuant to 12 U.S.C. §§ 1729(c)(1)(B)(i)(II), 1729(b)(1)(A)(vi), 1729(c)-(3)(A), and 12 U.S.C. § 1464(d)(6)(D) to operate San Marino in its own name and to conserve the assets of San Marino in the manner and to the extent authorized by the Bank Board by this resolution and other orders or resolutions of the Bank Board; and

RESOLVED FURTHER, That the Conservator shall have and exercise all rights, powers, privileges, and immunities and shall assume, perform, and discharge all responsibilities and obligations of a Conservator for a Federal association accorded or imposed by, and subject to, applicable provisions of law and regulations and orders of the Bank Board, including but not limited to, § 5(d) of the HOLA, 12 U.S.C. § 1464(d) (1982), and § 406 of the NHA, 12 U.S.C. § 1729 (1982) and the provisions of Parts 547 and 548 of the Rules and Regulations of the Federal Savings and Loan System ("Federal Regulations"); and

RESOLVED FURTHER, That, in addition to and in implementation of such rights, powers, privileges, immunities, and duties as are set forth in Parts 547 and 548 of the Federal Regulations and orders and resolutions of the Bank Board, the Conservator, is authorized and empowered, and need not seek further approval from the Bank Board:

(1) To employ and to terminate the services of such assistants and employees under such conditions as the Conservator may deem necessary for the proper administration of the office of Conservator;

(2) To issue order to all banks, depositories, business entities, or individuals having possession, custody, or control of any property, funds or assets of San Marino not to take any action in connection with, or disburse, remove, transfer, or dispose of such property, funds, or assets without written authorization from a Special Representative of the Conservator, or from such other person or persons as such special representative(s) may from time to time authorize in writing;

(3) To stop payment on checks of San Marino, permit checks of San Marino issued prior to the time the Conservator takes charge of San Marino and its affairs to clear through the accounts of the banks on which they were issued, or issue checks in redemption thereof;

(4) To continue existing depository accounts of San Marino without the necessity of closing and transferring the same, close out any existing accounts, and establish such new accounts in the name of San Marino or in the name of the Conservator as the operations of San Marino may require and as the Conservator may deem necessary;

(5) To retain or to open accounts in the Federal Home Loan Bank of San Francisco ("Bank") and to obtain

secured or unsecured advances from the Bank; and to execute and deliver such note and other evidences of indebtedness and security and such other instruments as may be necessary or appropriate in connection with such accounts or advances; and

(6) To obtain such loans or advances from the FSLIC in its corporate capacity as the Bank Board may from time to time authorize the FSLIC to make, and upon such terms and conditions and with such security, if any, as the Bank Board shall require, and to execute and deliver such notes and other evidences of indebtedness and security, or such other instruments as may be necessary or appropriate in connection with such loans or advances;

(7) To honor loan commitments and other contracts under which San Marino is obligated to make disbursements, and to make such loans and incur other obligations, within the limitations provided by the Charter of San Marino and applicable law and regulations, for the purposes of preserving, protecting, or salvaging the interests of San Marino; *provided,* however, that immediately upon making a loan the Conservator shall promptly report thereon to the director, OES;

(8) To borrow money in such amounts from any source, and in any manner, as the Conservator requires to fulfill its duties as Conservator, and to execute, acknowledge, and deliver evidence of indebtedness for such borrowings, and to secure repayment of such borrowings by mortgage, pledge, and assignment in trust, or hypothecation of any property of San Marino; and

RESOLVED FURTHER, That the Conservator need not furnish any bond; and

Implementing Authority

RESOLVED FURTHER, That the director or the Assistant Director for Regional Operations, Region II, OES, or any agent, employee, or attorney that may be designated by either ("Director"), is hereby authorized to take such action as may be necessary or appropriate to carry out the obligations of the Conservator, pursuant to its appointment; and

RESOLVED FURTHER, That the FSLIC, in its corporate capacity and not in its capacity as Conservator, is hereby authorized to make advances to the Conservator for the purpose of enabling the Conservator to perform its functions and duties, on such terms and conditions as the Director or Deputy Director, Office of the FSLIC, shall deem appropriate and the Director or Deputy Director, Office of the FSLIC, or the designee of either may execute such documents as may be necessary to make such advances or enter into collateral agreements; and

Special Representatives

RESOLVED FURTHER, That one or more persons shall be designated as Special Representative of the Conservator ("SR"); and that such designated person or persons shall have the power and authority to act in the name and on behalf of the Conservator, including the authority subject to the direction of the Director to take prompt possession of the books, records, property, and assets of every kind and description of San Marino and to exercise all powers of the Conservator; that initially, Timothy Lane shall serve as SR; and that the director may replace or remove any SR and may designate such

additional SR(s) as the Director deems appropriate, prescribing the functions and responsibilities of such SR(s) as he deems appropriate; and

Records and Reports

RESOLVED FURTHER, That each SR shall keep a record of his or her actions as SR of the Conservator, and shall report on such actions from time to time as directed by the Director; and

RESOLVED FURTHER, That the director shall from time to time report to the Bank Board with respect to actions taken pursuant to this resolution.

By the Federal Home Loan Bank Board

J. J. Finn
Secretary

APPENDIX D

Resolution No. 84-706

FEDERAL HOME LOAN BANK BOARD

Replacement of Conservator for
San Marino Savings and Loan Association
With a Receiver

No. 84-706
Date: December 6, 1984

WHEREAS, San Marino Savings and Loan Association, San Marino, California ("San Marino") is an institution incorporated under the laws of the State of California, the accounts of which are insured by the Federal Savings and Loan Insurance Corporation ("FSLIC"); and

WHEREAS, The Federal Home Loan Bank Board ("Bank Board"), by Resolution No. 84-59, dated February 3, 1984, appointed the FSLIC as conservator of San Marino ("Conservator") pursuant to § 406(c)(1)(B) of the National Housing Act, as amended ("NHA"), 12 U.S.C. § 1729(c)(1)(B) (1982), after a determination by the Bank Board that the grounds specified in § 5(d)(6)(A)(ii) and (iii) of the Home Owners' Loan Act of 1933, as amended ("HOLA"), 12 U.S.C. § 1464(d)(6)(A)(ii) and (iii) (1982), existed in that, *inter alia*, San Marino had incurred substantial dissipation of assets and earnings due to violations of law, rules and regulations, and due to unsafe and unsound practices, and that San Marino was in an unsafe and unsound condition to transact business; and

WHEREAS, An audit conducted by an independent Certified Public Accountant after the Conservator's appointment revealed that San Marino was insolvent as of February 3, 1984, in that its assets were less than its

obligations to its creditors and others, including its members; and

WHEREAS, The Conservator has been unable to cure San Marino's insolvency; and

WHEREAS, The Bank Board has reviewed the conduct of the conservatorship, the present condition of San Marino, and the possible actions that may be directed or provided for pursuant to § 547.7 of the Rules and Regulations for the Federal Savings and Loan System ("Federal Regulations") or otherwise, including directing the Conservator to turn over San Marino to its previous management or new management, providing for a meeting of the directors or replacing the conservator with another conservator or a receiver; and

WHEREAS, Pursuant to § 406(c)(3) of the NHA, 12 U.S.C. § 1729(c)(3) (1982), in any case in which the FSLIC is appointed conservator of an insured institution pursuant to § 406(c)(1) of the NHA, 12 U.S.C. § 1729(c)(1) (1982), the provisions of § 5(d) of the HOLA, 12 U.S.C. § 1464(d) (1982), shall be applicable in the same manner and to the same extent as if such institution were a Federal association with respect to which the FSLIC had been appointed conservator; and

WHEREAS, Pursuant to § 5(d)(6)(D) of the HOLA, 12 U.S.C. § 1464(d)(6)(D) (1982), the Bank Board may, without any requirement of notice, hearing, or other action, replace a conservator with a receiver, and shall appoint only the FSLIC as receiver; and

WHEREAS, The Bank Board has considered a joint staff memorandum dated December 4, 1984, from the Director, Office of Examinations and Supervision, and the Director, Office of the FSLIC, together with accompany-

ing attachments and exhibits (a copy of which memorandum is in the Minute Exhibit File):

Finding of Insolvency

NOW, THEREFORE, IT IS RESOLVED, That the Bank Board finds that the ground specified in § 5(d)(6)(A)(i) of the HOLA, 12 U.S.C. § 1464(d)(6)(A)(i) (1982), existed as of February 3, 1984, and continues to exist with respect to San Marino in that San Marino was as of such date and continues to be insolvent in that its assets were as of such date and continue to be less than its obligations to its creditors and others, including its members; and

Replacement of Conservator with Receiver

RESOLVED FURTHER, That the Bank Board, pursuant to § 5(d)(6)(D) of the HOLA, 12 U.S.C. § 5(d)(6)(D) (1982), hereby replaces the Conservator with the FSLIC as sole receiver for San Marino ("Receiver") for the purpose of liquidation; and

Directions to the Conservator

RESOLVED FURTHER, That the Bank Board directs the Conservator, pursuant to § 5(d)(6)(D) of the HOLA, 12 U.S.C. § 1464(d)(6)(D), (1982), and § 547.8(b) of the Rules and Regulations for the Federal Savings and Loan System ("Federal Regulations"), to surrender possession of San Marino to the Receiver; and

RESOLVED FURTHER, That upon the Conservator's surrender of possession of San Marino to the Receiver, the appointment of the FSLIC as Conservator of San Marino shall terminate; and

RESOLVED FURTHER, That the Conservator shall file with the Secretary to the Bank Board the report required by § 548.6 of the Federal Regulations; and

RESOLVED FURTHER, That an audit may be made in connection with the report made pursuant to § 548.6 of the Federal Regulations if determined to be appropriate by the Director, Office of Examinations and Supervision ("DOES"), *provided* that the DOES may utilize any audit made of the conservatorship or its affairs under authorization of the Bank Board, and *provided further*, that the DOES may contract on behalf of the FSLIC for such accounting or other services as may be deemed necessary by the DOES for such audit; and

Powers and Duties of Receiver

RESOLVED FURTHER, That, pursuant to §§ 406(b)(1) and (d) of the NHA, 12 U.S.C. §§ 1729(b)(1) and (d) (1982), the FSLIC as Receiver shall have and exercise all powers, rights, and privileges, and shall assume, perform, and discharge all duties, responsibilities, and obligations of a receiver for a Federal savings and loan association accorded or imposed by, and subject to, applicable provisions of law and regulations and orders of the Bank Board, including, but not limited to, § 5(d) of the HOLA, 12 U.S.C. § 1464(d) (1982), and § 406 of the NHA, 12 U.S.C. § 1729 (1982), and the provisions of Parts 547 and 549 of the Federal Regulations; and

RESOLVED FURTHER, That, in addition to all powers and authority of a receiver provided for by law, regulation and order, the Receiver is hereby authorized and empowered, and need not seek further approval from the Bank Board, to borrow money in such amounts from any source and in any manner as the Receiver requires to

fulfill its duties as receiver, to execute, acknowledge, and deliver evidence of indebtedness for such borrowings, and to secure repayment of such borrowings by mortgages, pledges, and assignments in trust, or hypothecation of any property of San Marino; and

RESOLVED FURTHER, That the Receiver is hereby authorized and empowered to take appropriate action to avoid any attachments of property of San Marino obtained during the conduct of the conservatorship; and

RESOLVED FURTHER, That the Receiver, in exercising its power of sale pursuant to § 549.3(b)(4) of the Federal Regulations, may make loans to facilitate the sale of property of San Marino, *provided* that any such loans may not include any amount attributable to future interest, fees, or expenses; and

RESOLVED FURTHER, That the Receiver may retain or replace such employees of San Marino as the Receiver deems necessary for the performance of its duties; and

RESOLVED FURTHER, That the Receiver need not furnish any bond; and

RESOLVED FURTHER, That, notwithstanding the provisions of § 548.1, as made applicable by § 549.2, of the Federal Regulations, the Receiver may elect to notify by certified mail all persons and entities that the Receiver knows to be holding or to be in possession of assets of San Marino; and

Implementing Authority

RESOLVED FURTHER, That the Director or Deputy Director for Operations and Administration, Office of the FSLIC, or any officer or employee of the FSLIC as

designated by either of them ("Director") is hereby authorized to take such action as may be necessary or appropriate to carry out the obligations of the FSLIC as Receiver, pursuant to its appointment; and

FSLIC Corporate Action

RESOLVED FURTHER, That the FSLIC, in its corporate capacity and not in its capacity as Receiver, is hereby authorized to make advances to the Receiver for the purpose of enabling the Receiver to perform its functions and duties and to enable the Receiver to administer or improve assets pledged to secure the repayment of obligations to or guaranteed by the FSLIC, on such terms and conditions as the Director shall deem appropriate, and the Director may execute such documents as may be necessary to make such advances or enter into collateral agreements, *provided*, however, that the final form of any such document or agreement shall be approved by the Office of the General Counsel; and

RESOLVED FURTHER, That the FSLIC in its corporate capacity and not as Receiver is hereby authorized to obtain assignments of claims of the Receiver, and the FSLIC as Receiver is authorized to tender such assignments to the FSLIC in its corporate capacity, *provided* that the FSLIC in its corporate capacity shall either pay fair value for any such claim or shall agree to pay over to the Receiver all proceeds received on the claim in excess of the expenses incurred by the FSLIC in pursuing such claim, and *provided further*, that the form of any such assignment shall be approved by the Office of the General Counsel; and

RESOLVED FURTHER, That the FSLIC, in its corporate capacity and not as Receiver, is hereby authorized to pay in full claims against the Receiver, the payment of

which the Director has determined will benefit the FSLIC in its corporate capacity, as subrogee of the insured accountholders of San Marino pursuant to the payment by the FSLIC of the insured accounts of San Marino, *provided*, however, that no such payment shall exceed $10,000 per claimant and such payments shall not total in the aggregate more than $500,000, and *provided further*, that upon payment of each such claim, the FSLIC, in its corporate capacity, shall obtain from each such claimant an assignment of such claim, and *provided further*, that the form of any such assignment shall be approved by the Office of the General Counsel; and

RESOLVED FURTHER, That the Director is authorized to make necessary determinations and implement the authority granted to the FSLIC in its corporate capacity by this Resolution; and

Special Representatives

RESOLVED FURTHER, That one or more persons shall be designated as Special Representative of the Receiver ("Special Representative"); and that such designated person or persons shall have the power and authority to act in the name and on the behalf of the Receiver, including the authority, subject to the direction of the Director, to take prompt possession of the books, records, property, and assets of every kind and description of San Marino and to exercise all powers of the Receiver; that initially, Gerald L. Reese, John W. Sears, Graham Y. Doxey, Robert L. Pattulo, John Kinghorn, and Mark F. Gasser shall each serve as Special Representative; and that the Director may replace or remove any Special Representative and may designate such additional Special Representative(s) as the Director deems appropriate, prescribing the functions and responsibili-

ties of such Special Representative(s) as the Director deems appropriate; and

Records and Reports

RESOLVED FURTHER, That each Special Representative shall keep a record of his or her actions as Special Representative for the Receiver, and shall report on such actions from time to time as directed by the Director; and

RESOLVED FURTHER, That the Director shall from time to time report to the Bank Board with respect to actions taken pursuant to this Resolution.

By the Federal Home Loan Bank Board

Assistant Secretary

APPENDIX E

Resolution No. 84-707

FEDERAL HOME LOAN BANK BOARD

Liquidation by FSLIC of Defaulted Institution:
San Marino Savings and Loan Association

No. 84-707

Date: December 6, 1984

Recitals

WHEREAS, The Federal Home Loan Bank Board ("Bank Board") has ordered the replacement of the Federal Savings and Loan Insurance Corporation ("FSLIC") as conservator ("Conservator") for San Marino Savings and Loan Association, San Marino, California ("San Marino") by the FSLIC as sole receiver ("Receiver") for the purpose of liquidation of San Marino pursuant to Resolution No. 84-706, dated December 6, 1984; and

WHEREAS, The FSLIC as Receiver is authorized by § 406(b)(1)(A)(v) and (d) of the National Housing Act, as amended ("NHA"), 12 U.S.C. § 1729(b)(1)(A)(v) and (d) (1982), upon its taking possession of San Marino to liquidate San Marino in an orderly manner should the FSLIC deem such action to be in the best interest of San Marino, its savers, and the FSLIC; and

WHEREAS, The Bank Board has considered a joint staff memorandum dated December 4, 1984, from the Director, Office of Examinations and Supervision, and the Director, Office of the FSLIC, together with accompanying attachments and exhibits (a copy of which memorandum is in the Minute Exhibit File):

Orderly Liquidation

NOW, THEREFORE, IT IS RESOLVED, That the Bank Board, as operating head of the FSLIC, hereby finds and determines that the Receiver's liquidation of San Marino in an orderly manner is in the best interest of San Marino, its savers, and the FSLIC; and

Receiver to Liquidate Defaulted Institution

RESOLVED FURTHER, That the Receiver be and hereby is authorized and directed, upon taking possession of San Marino, to liquidate San Marino in an orderly manner and in accordance with and subject to applicable statutes, rules, and regulations, including, but without limitation, §§ 406(b)(1), (c)(3), (d), and (e) of the NHA, 12 U.S.C. §§ 1729(b)(1), (c)(3), (d), and (e) (1982), and Parts 547 and 549 of the Rules and Regulations for the Federal Savings and Loan System ("Federal Regulations"), and in accordance with and subject to this and any other resolutions, orders, or directives of the Bank Board adopted in connection with the replacement of the Conservator by the Receiver or the conduct of the Receivership; and

Claims Procedure

RESOLVED FURTHER, That the Receiver shall proceed in accordance with and be governed by paragraphs (b) and (c) of § 549.5-1 of the Federal Regulations and not in accordance with §§ 549.4 or 549.5; and

RESOLVED FURTHER, That in accordance with § 548.2(o) of the Federal Regulations, made applicable by § 549.3(a) of the Federal Regulations, and pursuant to which the Bank Board may authorize and direct the Receiver by order to do such things and have such rights, powers, privileges, immunities and duties as the Bank

Board may prescribe, the Receiver is directed to approve claims and allow or disallow claims of security, preference or priority in accordance with the Federal Regulations and the following:

Secured Claims

(a) An allowed claims of a creditor secured by a lien on property of the association or in which the association has an interest is secured to the extent of the realizable value of the property securing such claim, and is unsecured to the extent that such realizable value is less than the amount of the allowed claim;

(b) The secured claims of a secured creditor, if accepted as valid by the Receiver, shall be allowed, not to exceed the amount of the principal obligation and contractually determined interest to the date of payment;

(c) A claim to security shall be recognized by the Receiver to the extent that, under the laws of the State of California, such creditor claims is secured by, or constitutes a lien on, assets or property of any kind of the association or in which the association has an interest;

(d) Allowance of contractually determined interest may include, to the extent provided for by written contract, interest on ordinary contractual interest chargeable in the event of a failure to pay principal or interest when due;

Unsecured Claims; Priorities

(e) Unsecured claims against the estate of the association that are proved to the satisfaction of the Receiver shall have priority in the following order:

(1) Administrative expenses of the Receiver, including the costs, expenses, and debts of the Receiver incurred on or after the Conservator's replacement by the Receiver;

(2) Administrative expenses of the Conservator, *provided* that such expenses were incurred within thirty (30) days prior to the Receiver's taking possession; and such expenses shall be limited to reasonable expenses incurred for services actually provided by accountants, attorneys, appraisers, or examiners that, in the opinion of the Receiver, are of benefit to the receivership estate, and shall not include wages or salaries of employees of the association or of the Conservator;

(3) Claims for wages and salaries, including vacation, sick leave pay, and contributions to employee benefit plans earned by an employee of the association within thirty (30) days prior to the appointment of the Receiver up to a maximum of two thousand dollars ($2,000.00) per person;

(4) Claims of governmental units for unpaid taxes; but no other claim of a governmental unit shall have a priority higher than that of the fifth category below;

(5) Claims for withdrawable accounts, including those of the FSLIC as subrogee or transferee, and all other claims, whether liquidated or unliquidated, which have accrued and become unconditionally fixed on or before the date of default, except as provided in succeeding paragraphs of this section;

(6) Claims other than those that have accrued and become unconditionally fixed on or before the date of default, including claims for interest after the date of default on claims of the fifth category; any claim based on an agreement for accelerated, stipulated, or liquidated damages, which claim did not accrue prior to the date of

default, shall be considered as not having accrued and become unconditionally fixed on or before the date of default;

(7) Claims that have been subordinated in whole or in part to general creditor claims, which shall be given the priority specified in the written instruments that evidence such claims;

(8) Claims by holders of nonwithdrawable accounts, including stock, which shall have priority within this eighth category in accordance with the terms of the written instruments that evidence such claims;

(f) Interest after the date of default on claims of the sixth category shall be at a rate or rates adjusted monthly to reflect the average rate for U.S. Treasury bills with maturities of not more than ninety-one (91) days during the preceding three (3) months; and

(g) All unsecured claims of any class of priority described in paragraphs (e)(1) through (e)(8) shall be paid in full, or provision made for such payment, before any claims of lesser priority are paid; if there are insufficient funds to pay any class of claims of one priority in full, distribution to claimants in such class shall be made pro rata; and notwithstanding anything to the contrary herein, the Receiver may at any time, and from time to time, prior to the payment in full of all claims of a class with higher priority, make such distributions to claimants in priority classes (e)(1), (e)(2), (e)(3), (e)(4) and (e)(5) as the Receiver believes are reasonably necessary to conduct the receivership, *provided* that the Receiver determines that adequate funds exist or will be recovered during the receivership to pay in full all claims of any higher priority; and

Treatment of Employee Severance Payment Claims

RESOLVED FURTHER, That, notwithstanding the terms of the fourth resolving paragraph of this Resolution, the claims of all employees of San Marino whose employment is terminated by the Recevier within thirty (30) days of the Receiver's taking possession of San Marino and who are determined by the Receiver to qualify for severance pay under the form of a written policy adopted by the Conservator shall be deemed to have a third priority among unsecured claims against the association's receivership estate; and

Receiver's Notices to Creditors and Savers

RESOLVED FURTHER, That the Receiver for San Marino is hereby directed by the Bank Board to publish notice to creditors and holders of savings deposits and savings accounts of San Marino in accordance with §§ 549.5-1(b) and (c)(1) of the Federal Regulations, with reasonable promptness after receiving from the FSLIC a schedule of deposits and accounts of San Marino that have been or are being surrendered and transferred to the FSLIC; and

Inventory and Audits

RESOLVED FURTHER, That as soon as practicable after taking possession of San Marino, the Receiver shall have an audit made of the recorded assets and liabilities of San Marino as of the date of the Receiver's taking possession; and

RESOLVED FURTHER, That a Receiver's inventory, pursuant to § 549.6(a) of the Federal Regulations, shall also be performed with the assistance of the Receiver by

the independent Certified Public Accountant that makes an audit of San Marino; and

RESOLVED FURTHER, That the scope of the Receiver's audit and inventory of the assets and liabilities of San Marino shall be determined by the Director or the Deputy Director for Operations and Administration, Office of the FSLIC; and

RESOLVED FURTHER, That annual audits of San Marino, pursuant to § 549.6(b) of the Federal Regulations, shall be made by an independent Certified Public Accountant; and

Contracts for Services

RESOLVED FURTHER, That the Receiver may contract for incidental services to assist the Receiver, including the rental or lease of premises and equipment, *provided* that the form of any such contract shall be approved by the Office of the General Counsel; and

Allocation of Expenditures

RESOLVED FURTHER, That the Receiver, in administering or improving assets that are pledged to secure payment of or obligations of San Marino or the Receiver for the FSLIC, shall expend for such purposes only funds generated by such assets or derived from advances made by the FSLIC and the Receiver for the purposes of administering or improving such assets; and

Delegation of Authority

RESOLVED FURTHER, That the Director or Deputy Director for Operations and Administration, Office of the FSLIC, or any officer or employee of the FSLIC designated in writing by either of the foregoing, and any Special Representative of the Receiver, may exercise any right, duty, power, privilege, or obligation of the Receiver authorized under this Resolution, or Resolution No. 84-706, dated December 6, 1984, replacing the Conservator with the Receiver.

By the Federal Home Loan Bank Board

Assistant Secretary

APPENDIX F

Order Granting Remand Of Action To San Joaquin Superior Court

RICHARD H. COOPER, ESQ.
WILLIAM H. JENNINGS, ESQ.
FRESHMAN, MULVANEY, MARANTZ,
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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
Case No. CIV S-84-1463-EJG

AMERICAN SAVINGS AND LOAN ASSOCIATION,
Plaintiff,

vs.

SAN MARINO SAVINGS AND LOAN ASSOCIATION, et al.,
Defendants.

Filed: December 18, 1984

The Court, having read and considered the moving and opposing papers on plaintiff's Motion to Remand Cause to San Joaquin Superior Court and having heard oral argument from counsel on the Motion, finds that the federal issues, if any, raised by the Complaint on file herein are not substantial or material in nature, but rather are purely incidental or tangential to the state-law claims raised therein, and that this action involves only the rights and obligations of San Marino Savings & Loan Association and plaintiff (as a creditor of San Marino)

under state law. Based upon such finding, the Court *holds* that the question of federal jurisdiction over this cause is governed by 12 U.S.C. § 1730(k)(l)(c) and that the proviso to such section applies to this cause such that there is no ground for federal jurisdiction over this cause.

ACCORDINGLY, THE COURT HEREBY ORDERS that this cause be remanded forthwith to San Joaquin Superior Court, and jurisdiction over this cause is hereby fully revested in the San Joaquin Superior Court.

DATED: December 18, 1984

EDWARD J. GARCIA
United States District Judge

APPENDIX G

Opinion of the United States Court of Appeals, Fifth Circuit (Hudspeth I)

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 84-4290

NORTH MISSISSIPPI SAVINGS & LOAN ASSOCIATION and NEW NORTH MISSISSIPPI FEDERAL SAVINGS & LOAN ASSOCIATION,
Plaintiffs-Appellees,

v.

JOSEPH M. HUDSPETH,
Defendant-Appellant.

April 5, 1985

Appeal from the United States District Court for the Northern District of Mississippi

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Before THORNBERRY, REAVLEY, and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

A state-court contract dispute between North Mississippi Savings & Loan Association, "Old North," and Joseph M. Hudspeth took on new dimensions when the Federal Savings & Loan Insurance Corporation placed Old North in receivership and transferred its assets to a newly-created institution, New North Mississippi Federal Savings & Loan Association. After Hudspeth amended his counterclaim against Old North to name New North as a defendant, New North and the FSLIC, as receiver of Old North, removed to federal court and successfully moved to dismiss for lack of subject-matter jurisdiction. Hudspeth challenges both the removal and the dismissal. We hold that the presence of New North and the FSLIC made this action removable under 12 U.S.C. § 1730(k)(1). We also agree that the district court properly dismissed all of Hudspeth's claims against New North and much of his action against Old North. One of Hudspeth's claims though — against Old North for payment for past services rendered — is not barred by the relevant federal statutes, 12 U.S.C.§§ 1464(d)(6)(C) and 1729(d). The survival of this state-law claim against a failed state institution, coupled with the dismissal of New North, makes remand to state court now appropriate.

I

Until 1977, Joseph Hudspeth was the president of Old North, a state-chartered institution not insured by the Federal Savings & Loan Insurance Corporation. In 1977, the Mississippi legislature passed a statute requiring all state thrift institutions to obtain FSLIC insurance. The Federal Home Loan Bank Board refused to authorize insurance for Old North unless Hudspeth was replaced as president. When Hudspeth stepped down, Old North began paying him a regular monthly amount under what

Hudspeth claims was a deferred compensation agreement.

In 1982, Old North filed this action in Mississippi chancery court for a declaration that its agreement with Hudspeth either did not exist or was terminable. Hudspeth counterclaimed for specific performance or damages for breach of contract. Old North continued to make the monthly payments until April of 1983.

On April 11, 1983, the State of Mississippi put Old North into state receivership and appointed the FSLIC as state receiver. On the same day, the FHLBB determined that Old North was insolvent and "federalized" the receivership by naming the FSLIC as the sole receiver of Old North under 12 U.S.C. § 1729(c)(1)(B). The FSLIC then formed a new federally-chartered institution, New North Mississippi Federal Savings & Loan, and appointed a federal conservator to run New North. Old North transferred to New North essentially all of its assets[1] and all liabilities except Old North's liabilities to its stockholders and any obligation owed by Old North under a compensation agreement such as Hudspeth's. The FSLIC, as receiver of Old North, then terminated all such agreements and stopped the payments to Hudspeth.

The FSLIC, on behalf of Old North, unsuccessfully moved in state court to dismiss the counterclaim. Hudspeth then filed an amended counterclaim joining New North as a party, alleging that New North was a transferee in interest under Mississippi law, and seeking actual and punitive damages from Old North and New North.

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[1]New North agreed to reconvey to the FSLIC as receiver, on the FSLIC's request, any potential claim for malfeasance against Old North's officers or employees.

The FSLIC and New North removed the action to federal court and moved to dismiss. Hudspeth moved to remand to state court. In a thoughtful opinion, the court denied the motion to remand and granted the motion to dismiss the counterclaim.

II

The district court upheld the removal to federal court primarily on the authority of 12 U.S.C. § 1730(k)(1), which states:

> Notwithstanding any other provision of law, (A) the Corporation [the FSLIC] shall be deemed to be an agency of the United States within the meaning of section 451 of Title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: *Provided,* That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before final judgment in any action, suit,

> or proceeding in any court of any State or of the United States or any territory, or any other court.

Hudspeth argues that the FSLIC is not a "party" to this suit under subsection (B) because it has never been formally joined. Even if the FSLIC is a party, Hudspeth contends that this action "involves only the rights or obligations of investors, creditors, stockholders," and Old North under Mississippi law, and that the statute therefore precludes federal jurisdiction.

In *Farina v. Mission Investment Trust,* 615 F.2d 1068, 1074-75 & n. 19 (5th Cir.1980), this court affirmed the existence of federal jurisdiction under 12 U.S.C. § 1819 (4), the FDIC parallel to § 1730(k)(1), based on the presence of the FDIC as receiver or successor in interest for one defendant, a failed commercial bank. We stated that the formal intervention or joinder of the FDIC was not necessary, and that such a requirement "would render federal pleadings excessively technical" in contradiction of Federal Rules of Civil Procedure 8(e)(1) and 8(f). 615 F.2d at 1074. The rationale of *Farina* is equally applicable here. Even though the FSLIC has not been formally joined, it is a party in the contemplation of § 1730(k)(1).

The § 1730(k)(1) proviso cited by Hudspeth excepts from the statute's general grant of federal jurisdiction actions where two conditions are both present: (1) only the rights or obligations of investors, creditors, stockholders, and a State-chartered institution in FSLIC receivership or conservatorship are at issue, and (2) only questions of state law are involved. Hudspeth, though, sued and demanded damages from New North, a federally-chartered institution that was neither an investor, creditor, nor stockholder of Old North. Hudspeth's action asked the court to determine New North's rights and

obligations, and thus was not governed by the proviso. *See American National Bank v. FDIC*, 710 F.2d 1528, 1533 n. 5 (11th Cir.1983) (parallel proviso, 12 U.S.C. § 1819(4), inapplicable when third party's rights are involved). Removal was therefore proper under § 1730(k)(1)(B) and (C).

III

The district court construed Hudspeth's counterclaim as a challenge to the validity of the FSLIC's termination of the compensation contract and its transfer of Old North's assets and liabilities to New North. The court then relied on 12 U.S.C. § 1464(d)(6)(C):

> Except as otherwise provided in this subsection, no court may . . . , except at the instance of the [FHLBB], restrain or affect the exercise of powers or functions of a conservator or receiver.

and 12 U.S.C. § 1729(d):

> In connection with the liquidation of insured institutions, the [FSLIC] shall have power . . . to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board. . . .

In holding that "original jurisdiction over the conduct of FSLIC . . . lies with FHLBB," rather than any court.[2]

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[2]Section 1464(d)(6)(C), passed as part of the Financial Institutions Supervisory Act of 1966, originally applied only to receiverships of federally-chartered institutions. Section 1729(d) was part of the Bank Protection Act of 1968, which empowered the FHLBB to appoint the FSLIC as federal receiver of state-chartered thrifts. The

Stating that Hudspeth's sole remedy was a petition to the FHLBB, with judicial review then available under the Administrative Procedure Act, the court dismissed the counterclaim for lack of subject matter jurisdiction.

Hudspeth's counterclaim seeks a declaratory judgment that the contract remains valid and binding, as well as exemplary and mental-anguish damages based on the allegedly wrongful termination of the contract. Alternatively, it avers that Hudspeth has "substantially completed his performance under the aforesaid contract and has a valid credit claim," [3] and demands a money judgment for the present value of the contract at the time payment stopped. In addition, Hudspeth seeks to impose liability for this claim on New North as Old North's "transferee in interest" under Mississippi law. *See West Center Apartments Ltd. v. Keyes*, 371 So.2d 854 (Miss. 1979).

In explaining the Bank Protection Act of 1968, which made § 1464(d)(6)(C) applicable in receiverships of state thrift institutions, the Senate confimed that the FSLIC's authority "[i]n carrying out its receivership responsibilities . . . would be subject only to the regulation of the Federal Home Loan Bank Board . . . ." S.Rep. No. 1263, 90th Cong., 2d Sess. 10, *reprinted in* 1968 U.S. Code Cong. & Admin.News 2530, 2539. Congress wanted the FSLIC to be able to act quickly and decisively in reorganizing, operating, or dissolving a failed institution,

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1968 Act also made § 1464(d) applicable in such "federalized" receiverships. *See* 12 U.S.C. § 1729(c)(3)(A).

[3]The district court dismissed the counterclaim on the pleadings and we accept Hudspeth's allegation of substantial performance as true for purposes of this appeal. *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir.), *cert. denied*, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981).

and intended that the FSLIC's ability to accomplish these goals not be interfered with by other judicial or regulatory authorities.

The statutory scheme thus routes to the administrative process Hudspeth's assertion that FHLBB regulations did not authorize the FSLIC here to set aside an otherwise-enforceable contract.[4] That act was unquestionably an exercise of the FSLIC's powers as a receiver, analogous to a trustee's rejection of a contract in a bankruptcy proceeding. *See* 11 U.S.C. § 365(a).

Similarly, Hudspeth's attempt to charge New North with Old North's debt, despite the FSLIC's failure to transfer that liability, crosses the line drawn by the relevant statutes. The FSLIC, in working out the terms of the transfer between Old North and New North, essentially acted as a liquidator. It allocated the demands of competing claimants to Old North's limited assets by, in effect, relegating two classes of claimants — Old North stockholders, and Hudspeth — to second-priority status, leaving for satisfaction of their claims only the right of Old North to reacquire from New North any claims for officer malfeasance.

Once again, it is not our job to decide whether the FSLIC could parcel out Old North's assets in this particular manner. The FSLIC has the authority to liquidate

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[4]Hudspeth argues that although 12 C.F.R. § 569a.6(c)(3) gives the FSLIC, as receiver of a nonfederal institution, the power to "[r]eject or repudiate any lease or contract which it considers burdensome," § 569a.13 makes § 569a.6(c)(3) inapplicable to purchase and assumption transactions. The FSLIC replies that the FHLBB resolution appointing the FSLIC as Old North's receiver expressly granted the FSLIC the powers of a receiver of a federal association, which contain no restriction corresponding to § 569a.13. *See* 12 C.F.R. §§ 549.3, 548.2. We intimate no view on this issue.

failed institutions. 12 U.S.C. §§ 1729(a), (b)(1)(A)(v), (c)(3)(B), and (d). Indeed, the motivating force behind the passage of the Bank Protection Act of 1968 was to permit the FSLIC to intervene in state receiverships not geared toward liquidation, so that it could order liquidation and recoup its insurance payments to savers. *See* S.Rep. No. 1263, 90th Cong., 2d Sess. 8, 11, *reprinted in* 1968 U.S. Code Cong. & Admin. News 2530, 2537, 2540. Inherent in the power to liquidate is the right to "[fix] the time and manner of distribution" of assets. *Morris v. Jones*, 329 U.S. 545, 549, 67 S.CT. 451, 454, 91 L.Ed. 488 (1947). Even if otherwise correct under Mississippi law, any court ruling that New North bears a liability not assigned it by the FSLIC would modify the FSLIC's distribution of assets, and would "restrain or affect" the FSLIC's powers as a receiver in violation of 12 U.S.C. § 1464(d)(6)(C).

All of Hudspeth's claims of injury caused by FSLIC conduct are thus switched to the administrative track by § 1464(d)(6)(C). These include all claims for exemplary damages and for mental anguish stemming from the FSLIC's acts. Hudspeth can challenge the FSLIC's behavior *qua* receiver before the FHLBB, and, if unsatisfied, can seek judicial review under the APA. *See First Savings & Loan Ass'n v. First Savings & Loan Ass'n*, 531 F.Supp. 251, 254 (D.Haw.1981).

To the extent, however, that the counterclaim demands only that Old North's debt to Hudspeth be judicially established, we agree with Hudspeth that §§ 1464(d)(6)(C) and 1729(d) are no bar. The Supreme Court explained in *Riehle v. Margolies*, 279 U.S. 218, 49 S.Ct. 310, 73 L.Ed. 669 (1929) and *Morris v. Jones*, 329 U.S.

545, 67 S.Ct. 451, 91 L.Ed. 488 (1947)[5] that the adjudication of claims against a debtor, as opposed to the allocation of assets to satisfy those claims, is not a receivership function. As Justice Douglas said in *Morris*:

> [P]roof and allowance of claims are matters distinct from distribution. They do not "deal directly with any of the property." . . . The establishment of the existence and amount of a claim against the debtor in no way disturbs the possession of the liquidation court, in no way affects title to the property, and does not necessarily involve a determination of what priority the claim should have.

329 U.S. at 549, 67 S.Ct. at 454, *quoting Riehle,* 279 U.S. at 224, 49 S.Ct. at 312.

Nothing in the relevant statutes or legislative history indicates that the FSLIC has the power to adjudicate claims. As explained above, Congress in 1968 sought to make applicable to state institutions the FSLIC's power to liquidate. The history of the 1968 Act reflects no intent to expand the FSLIC's powers beyond those normally assumed by a receiver. Furthermore, 12 U.S.C. § 1729(b)(1)(B) requires the FSLIC, as receiver, to "pay all valid credit obligations" of the failed institution. Section

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[5] *Riehle* dealt with an equitable receivership under state law. *Morris,* an insurance liquidation case, raised questions under the Full Faith and Credit Clause of the U.S. Constitution. The principle they state has been applied in federal bankruptcy cases, *see, eg., Fotochrome, Inc. v. Copal Co.,* 517 F.2d 512, 517 (2d Cir. 1975), and was recently reaffirmed by the Supreme Court. *Underwriters National Assurance Co. v. North Carolina Life and Accident and Health Insurance Guaranty Ass'n.,* 455 U.S. 691, 711 n. 19, 102 S.Ct. 1357, 1359 n. 19, 71 L.Ed.2d 558 (1982); *id.* at 718, 102 S.Ct. at 1373 (White, J., concurring in the judgment). We find the reasoning of *Riehle* and *Morris* applicable to this federal bank receivership.

1729(d) itself authorizes the FSLIC only to "settle, compromise, or release claims" against the institution. Both sections imply that the FLIC cannot unilaterally resolve the merits of claims, and that some other entity may, if necessary, decide whether a claim against the institution is in fact valid.

Our decision is no doubt little comfort to Hudspeth. Although he might judicially establish Old North's debt, he will not be able to enforce that debt against New North unless he seeks administrative review before the FHLBB.[6] To explain our view here, we suggest that other potential judgment creditors of insolvent thrifts might fare differently. Not all FSLIC receiverships involve liquidation; the FSLIC can take more limited action, such as replacing a thrift's officers, 12 U.S.C. § 1464(d) (4); loaning it money, § 1729(f) (1); or operation the institution itself, § 1729(b) (1) (A) (i). If the FSLIC, as receiver, takes no steps purporting to impede the rights of any of the institution's creditors to full recovery, we see no statutory bar to a claimant's obtaining a court judgment, enforceable by the rendering court.

Finally, because New North must be dismissed as counterdefendant, Hudspeth's surviving claim now falls within the proviso of 12 U.S.C. § 1730(k) (1). That claim rests only on Mississippi law, and involves as parties only Hudspeth and the FSLIC as receiver of a state savings and loan. Under the proviso, the case should now be remanded to the Mississippi courts. We reject the FSLIC's assertion that the § 1730(k) (1) proviso is inapplicable to federalized receiverships. The proviso contem-

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[6]A judgment that Hudspeth's claim is legally valid might, of course, color the FHLBB's view concerning Hudspeth's right to recover, and might be considered relevant by a reviewing court in an APA action.

plates actions "under State law" against the FSLIC "in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution." By its terms, the proviso is not limited to suits against the FSLIC as state receiver. Concededly, when § 1730(k) (1) was passed in 1966, only a state court could have named the FSLIC as receiver of a state thrift. There is no evidence, though, that the 1968 act creating federalized receiverships was meant to limit the scope of the proviso by redefining as "federal" ordinary contract or tort actions not implicating receivership functions.

IV

When read in concert, 12 U.S.C. §§ 1464(d)(6)(C), 1729, and 1730(k)(1) construct an orderly scheme. In suits against a state savings institution in a federalized receivership, where the relief requested would interfere with or overturn the effect of any exercise of receivership power, the suit must be dismissed in favor of administrative proceedings before the FHLBB. If, however, an action is based on the pre-receivership conduct of the failed institution, the debt due may be judicially established. If federal jurisdiction otherwise exists, if federal law is involved, or if there is a party to the suit who is not a state-chartered institution in FSLIC receivership or conservatorship or an investor, creditor, or stockholder of such an institution, the case is removable to federal district court. The presence of a third party would not always mean, as here, that receivership functions were involved and that the suit should be dismissed. The third party might not be a transferee of assets—it could be, for example, a codefendant. If the claim relies only on state law, and if no third party's rights are at issue, the state court suit is not removable under 12 U.S.C § 1730(k)(1).

Hudspeth's claims that challenge the FSLIC's receivership operations were properly dismissed. Hudspeth, however, also alleges a matured claim not dependent on any judicial assessment of the FSLIC's acts.[7] This claim derives from Mississippi law, and in the Mississippi court can be asserted only against the failed State institution, Old North. Therefore, Hudspeth's demand for judicial establishment of Old North's obligation to him, should he wish to proceed with it, should be remanded to state court. Any debt so established can then be the basis for a claim filed with the FHLBB.

We affirm the district court's original denial of remand to state court, reverse in part the dismissal of Hudspeth's counterclaim, and remand with instructions to remand to state court Hudspeth's claim against Old North.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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[7]Of course, denying that Old North had liability under the contract is an act of the receiver, but it does not implicate the competing concerns of the regulator and creditors of the failed institution, and is not an "act" in the sense we use it here.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 24, 1986, I served the within Petition for Writ of Certiorari in re: "American Savings & Loan Association vs. Federal Savings & Loan Insurance Corporation" in the U.S. Supreme Court, October Term 1986, No. . . . .;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Tuttle & Taylor Inc.
355 South Grand Avenue
40th Floor
Los Angeles, California 90071
Attention: C. Stephen Howard

General Counsel
Federal Home Loan Bank Board
1700 "G" Street N.W.
Washington, D.C. 20552
Attention: Harry Quillian

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 24, 1986, at Los Angeles, California

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